1992

St. George Thrift and Loan v. Raymond L. Lowe : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

St. George Thrift and Loan Plaintiff v. Raymond L. Lowe, Defendant	Case No. 920852CA Priority 15
Raymond L. Lowe, Third-Party Plaintiff, and Appellee. v. Gregory A. Knox, Third-Party Defendant, and Appellant.	

APPELLANT'S REPLY BRIEF

Appeal from the Order Granting Summary Judgment for the Plaint-
entered in the Fifth Judicial District Court, Washington County
The Honorable James L. Shumate

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ISSUES PRESENTED BY APPELLEE'S BRIEF

1. Has Knox alleged a meritorious claim of innocent misrepresentation?

2. Did Knox raise any genuine issue of material fact in resisting Lowe's motion for summary judgment?

3. Is Knox's claim for innocent misrepresentation barred by operation of U.C.A. Section 78-12-26(3)?

DETERMINATIVE AUTHORITY

Utah Code Ann., Section 78-12-26 (1953) as amended, is the central statute relied upon by the Defendant in this case. In addition, Utah Rule of Civil Procedure 56 is relied upon with regard to the Court's granting the Motion of Summary Judgment. However, because this Statute and Rule are too lengthy to set out in full, they are included in the addendum, pursuant to Utah Rules of Appellate Procedure 24(f) and 24(a)(6).

SUMMARY OF THE ARGUMENTS

1. Lowe's holding out his property for sale at the asking price of $69,900 was a sufficient act of representation to meet that qualification for Knox's case of misrepresentation.

2. Knox had a legal basis for relying on Lowe's opinion of value in circumstances where Lowe denied access to an appraisal.

3. Knox raised sufficient genuine issues of material fact regarding the actual value of Lowe's property at the time of purchase on the face of his deposition to resist Lowe's motion for summary judgment.

4. Knox's claim of misrepresentation is not barred by the statute of limitations due to his reliance on a faulty appraisal done by his qualified agent.

ARGUMENTS

I. LOWE'S ASKING AND BARGAINING PRICE WAS AN ASSERTION AND A REPRESENTATION.

"A misrepresentation is an assertion not in accord with the facts." Comment: a. Nature of assertion. A misrepresentation, being a false assertion of fact, commonly takes the form of spoken or written words. Whether a statement is false depends on the meaning of the words in all the circumstances, including what may fairly be inferred from them. An assertion may also be inferred from conduct other than words." (See Restatement 2d, **Contracts**, 159 (1979 ed.). Also, see Crocker-Anglo Nat. Bank v.Kuchman, 224 C.A.2d. 496, (Cal. 1964), an innocent misrepresentation case, (wherein a seller of closely-held stock had innocently overvalued it), which states:

> It is alleged that such a mistake was made here. The value of the corporate stock, as reflected by the assets of the corporation, its business, its prospects, and its goodwill was certainly a material fact. (emphasis added).

Knox alleges that Lowe advertized his asking price in written form, spoke it verbally, and then defended it by other words and conduct, such as disclosing information about impending road construction and adjacent BLM land, and, that these various actions were assertions that his property was worth $69,900. (See Record, pp. 77, 200, 204, 206-209, 216-217). Also, while subject to varying opinions, the actual value of Lowe's property was ultimately as much of a material fact as the value of the corporate stock in the above mentioned Crocker case.

Thus, in the context of the rules defined by these authorities, the representation element of his case for innocent misrepresentation has been properly alleged. Also, while no Utah case for innocent misrepresentation can be located, it has been authoritatively stated that an agreement obtained by misrepresentation, fraud, or mistake is generally voidable. (See Tanner v. District Judges of Third Judicial Dist., 649 P.2d 5., (Utah 1982). (See, generally, Record. at pp. 152-153).

II. KNOX WAS LEGALLY JUSTIFIED IN RELYING ON LOWE'S REPRESENTATION OF HIS PROPERTY'S VALUE AS FACT AND NOT OPINION

At Restatement 2d, Contracts, Misrepresentation, 168(2) (1979 e.), under the title "Reliance on Assertions of Opinion," it states:

> If it is reasonable to do so, the recipient of an assertion of a person's opinion as to facts not disclosed and not otherwise known to the recipient may properly interpret it as an assertion
>
> (a) that the facts known to that person are not incompatible with his opinion, or
>
> (b) that he knows facts sufficient to justify him in forming it.

(emphasis added). "In such a case," according to the explanation of this provision of the "Restatement," "the statement of opinion becomes, in effect, an assertion as to those facts and may be relied on as such."

Thus, in Knox's situation, Lowe was giving an opinion of the value of the property at $69,900. Because the actual value was not disclosed and not otherwise known to Knox, (because of his inability to obtain an appraisal), Knox was entitled to assume

that Lowe knew facts from which he drew his opinion. And, since Knox did not have access to those facts, he was legally entitled to rely on Lowe's version of them.

Well settled law, including that cited by Lowe, is not in conflict with the rule stated above. The key phrase from "Restatement" at 168 is as to facts "not otherwise known." In this case, the actual value of the property, should a jury find it to be $52,000 as Knox alleges, was a fact "not otherwise known" to Knox. If Knox had not sought and/or Lowe not denied access to an appraisal, the knowledge of the actual value of the property would have been imputed to Knox by case law.

In 1903, the U.S. Supreme Court stated in Shapiro v. Goldberg, 192 U.S. 419, at 422:

> Where means of knowledge are at hand, and are equally available to both parties, and the subject of purchase is open for inspection if the purchaser does not avail himself of these means he will not be heard to say, to impeach the contract, that he was deceived by the vendor's misrepresentations. (empahsis added).

In Wright v. Westside Nursery, 787 P.2d 508 (Utah App. 1990), a tort case, there was no appraisal sought and no access denied by the property seller. (Parenthetically, that case involved, to Knox's best information, Mr. Pendleton, Lowe's attorney, and a reversal of the Honorable Judge Shumate's decision at trial to send the case to a jury). Thus, in the "Wright" case, as well as other Utah cases, the purchaser was charged with the knowledge of facts he could have obtained but for his own negligence.

However, where access to those facts is blocked by the

seller, a jury may find that reliance on what normally would only be the seller's opinion may be justified. (See Baird v. Eflow Inv. Co., 298 P. 112, (Utah 1930), at p. 114). Not only would the legal foundation from the "Restatement", and "Misrepresentation" 168 allow Knox to rely on Lowe's "opinion" as to the value of the property as a fact, but a jury could find, in light of the language from Shapiro above, (and not contravened by any Utah authority), that Lowe's property was not "open for inspection," that "means of knowledge" were not "at hand," or "equally available" to Knox. (See, generally, Record, at pp. 153-157).

Knox does not rely on Restatement, 2nd, Torts, 542, regarding specialized knowledge of an adverse party, as alleged in Lowe's brief, for his legal theory of reliance on Lowe's assertions. Further, Knox concedes he maintains no direct action against Lowe for specific misrepresentations as to road construction or unobstructed views from the property. However, he does maintain his claim for misrepresentation based upon the disparity between Lowe's represented value of $69,900 and the alleged actual value of $52,500. (See Record, pp. 198, 207-213, 218-220, 234-235).

III. KNOX RAISED SUFFICIENT EVIDENCE TO RESIST LOWE'S MOTION FOR SUMMARY JUDGMENT ON THE FACE OF HIS DEPOSITION

In the record are three different opinions regarding the value of the property. There is Lowe's assertion inherent in the $69,900 sales price, stated in pleadings and Knox's deposition. (See Record, p. 77, 200, 206-209) There is the Miller

appraisal for $69,500, described in Knox's deposition, (see Record, pp. 253, 214-217, 220-222) and the value of $52,500, from an appraisal obtained by St. George Thrift and Loan, also from Knox's deposition as well as the pleadings. (See Record, pp. 78, 223-226). Lowe denies Knox's alleged value in his pleadings. (See Record, pp. 76, 93-94).

Knox initially alleged that the actual value of the Lowe property was only $52,500 in his verified pleadings. (See Record, pp. 76, 78). Lowe's motion for summary judgment was not supported by any affidavits, but soley by pleadings and Knox's deposition. "Exhibit #1" attatched to the deposition is the Miller appraisal, stating a value of $69,500 for the property.

Rule 56(e), Utah Rules of Civil Procedure, requires a defense by other than pleadings when a motion for summary judgment is supported by affidavits. Further, "The court may permit affidavits to be supplemented or opposed by depositions, . . .(emphasis added). Rule 56(c) states that "The judgment sought shall be rendered forthwith if the pleadings, depositions, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." (emphasis added).

In his summary judgment motion, Lowe brought forth no affidavits. Thus, on the face of Rule 56(e), it would seem that Knox could rest entirely on his pleadings, since depositions are supplementary to affidavits. However, Utah case law has allowed a moving party to rely upon a deposition even when there were no

affidavits. (See United American Life Ins. Co. v. Willey, 444 P.2d 755 (Utah 1968)). Thus, Knox's deposition, which was published and entered into the record in its entirety by Lowe's motion, was the "affidavit" before the court. (See Record, pp. 130-131).

Under the rule stated in Franklin Financial v. New Empire Develop. Co., 659 P.2d 1040 (Utah 1983):

> . . .the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue.

(At 1044, emphasis added) Footnote "1" states:

> We assume, without deciding, that summary judgment may not be entered where the moving affidavits show on their face that there is a material issue of fact. (emphasis added).

And, under Rule 56(c), (wherein summary judgment is only proper where depositions and other materials show that there is no genuine issue as to any material fact), Knox resists summary judgment successfully if his deposition discloses the existence of such a factual issue.

Rule 56(e) states that ". . . affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Based upon these requirements, there are no "facts" in the record regarding the actual value of property. Neither Lowe's, Miller's, or the St. George Thrift & Loan's appraiser's testimonies are in the record. All there is is Knox's hearsay testimony about these

opinions in his deposition. Thus, Lowe put forth no facts into the record which Knox needed to oppose, (other than by Knox's pleadings).

However, if Knox's deposition testimony is a fact about the disparities in values between these various opinions, then the fact of Lowe's and Miller's assertions of values at about $70,000, and the fact of the Thrift's appraisal at $52,500 are on equal footing, since they are all opinions given by others to Knox. The Miller appraisal is no more evidentiary than the Thrift's appraisals quoted to Knox over the phone, since all enter the record through Knox's deposition and pleadings and in no other way. Thus, Knox meets the test laid out in Thornock v. Cook, 604 P.2d 934 (Utah 1979), because he can rely on the specific fact of the Thrift's appraisal set forth in his deposition, and need not rely soley on his pleadings. (See Record, pp. 223-226). Further, nothing in his deposition contradicts his pleadings, as was the case in Thornock.

Since the only "facts" in Lowe's summary judgment motion which Knox was required to resist with "evidence" under Rule 56 (c) and (e) were contained in one deposition, which on its face shows Knox's claim of a $52,500 appraisal communicated to him by the Thrift, the district court could not have properly found against Knox on a procedural level.

IV. MILLER'S MISTAKE IN HIS 1986 OPINION SHOULD NOT BE IMPUTED TO KNOX IF KNOX'S RELIANCE THEREON WAS REASONABLE AND DID NOT PUT HIM ON INQUIRY.

Lowe's argument appears to be that when Knox received the

Miller appraisal in 1986 he was in such a comparable position to the proponents in both the McConkie and Koulis cases that discovery of the misrepresentation in 1986 should be imputed to him as a matter of law. (See McConkie v. Hartman, 529 P.2d 801, (Utah 1974), and Koulis v. Standard Oil Co. of Cal., 746 P.2d 1182 (Utah App. 1987).

In McConkie, (not a summary judgment case), the dispute was over reservation of mineral rights in a real estate sales contract. The party claiming the misrepresentation had constructive possession of recorded deeds which contained the alleged incriminating facts at the time the sale closed. Subsequently, the facts appeared in a title report issued when the property was refinanced. Neither document was examined until after the statute of limitations had run. The court imputed knowledge of the facts in the deeds and the title report to the buyer at the time these documents were issued.

In Koulis, a summary judgment decision, the complainant inherited property upon which a service station was built and leased to Standard Oil. She discovered after the statute had run that the station was built partly on a neighbor's property in violation of the lease agreement. The court imputed an earlier, "pre-statute" discovery of the breach to her for the following reasons: She had lived on the property for seventeen years, was aware of neighboring property boundaries, and saw the completed service station. The lease agreement had been signed in 1958, with an extension signed in 1967.

In 1968, she became executrix of the estate to which the lease belonged, and became aware of the existence of the lease agreement. However, she never bothered, as either executrix of the estate or successor in interest, to order copies of the lease or extension. When Standard Oil finally furnished copies in 1982, she recognized a breach, had the property surveyed, discovered the station had been built partly on neighboring property, and brought suit.

In these cases, the Court properly imputed constructive possession of key facts to the complainants. In McConkie, the owner of property failed to inspect either a deed or a subsequent title report. In Koulis, an executrix/hier failed to either obtain or inspect copies of the contracts giving rights to a major asset probated and then owned. Knox, on the other hand, obtained an appraisal immediately upon receiving possession of his property, and nothing in the appraisal put him on notice that the property was actually worth only $52,500 when he had paid $69,900.

The actual value of Lowe's property at the time of Knox's purchase was a fact. (See Argument I.) Assuming that the value was $52,000, and that Lowe actively concealed it before the transaction was concluded, the issue becomes the time which Knox either discovered the $52,000 value or was put on notice or under a legal duty to discover it. While Lowe, as a seller blocking alternative opinions, and Miller, Knox's appraiser, were under certain legal duties to be accurate in their opinions of the property's value, Knox's only legal duty was to reasonably rely

on their opinions.

Had Lowe consented to an identical appraisal by Miller before the transaction was closed, Knox would have had no basis for relying on Lowe's opinion, and would be liable for Miller's mistakes. However, once entitled to rely on Lowe's opinion, (see Argument II.), which was a misrepresentation, Knox's legal duties as to when the misrepresentation was discovered flow only from what a reasonable person would have done in his place. A reasonable person could have relied on Miller's inaccurate opinion, which almost matched Lowe's.

Knox will only be able to prevail at trial if a jury finds, after examining admissible opinions of experts that are tested by thorough cross-examination, that something in the neighborhood of the $52,500 value claimed by Knox is a fact. In a rare case where a buyer is legally permitted to rely on a seller's misrepsentation of value, (which must be confirmed as a fact by the jury) there is no precedent for altering the standard as to when the seller is deemed to have discovered it. Indeed, the Court need not worry about creating an exception concerning the running of the statute. Knox has an action under existing statutory and case law.

On the other hand, to impute the facts Miller's appraisal failed to reveal to Knox would create new law. Existing law imputs to Knox facts either in his possession or facts he would have discovered when put on reasonable inquiry. Imputing to him the mistake of his qualified agent would indeed stretch the ex-

isting limits of U.C.A. Section 78-12-26(3) as to when an aggrieved party discovers the facts constituting fraud or mis take. For such an expansion of the law Lowe cites no authority.

CONCLUSION

The Court will discover that a jury would have a legal basis for finding that Lowe made assertions and representations regarding the value of this property, that such value was a material fact, and that Knox was entitled to rely on Lowe's assertions because the actual value was concealed from Knox through no negligence or fault of his own.

Further, in Knox's deposition, the opinions of Lowe, Miller and the Thrift's appraisers are all put forward. Thus, on the face of his deposition Knox placed genuine issues of fact regarding the value of the property and the time of its discovery before the Court.

Finally, when viewed in the light most favorable to Knox, facts in the Record regarding the time of the discovery of the misrepresentation do not as a matter of law deem a 1986 discovery which would place his defense beyond the running of the statute of limitations.

The Third-Party Defendant continues to seek reversal of the Order granting Summary Judgment, and a remand for a trial on the matter.

Dated this 6th day of April, 1993.

Gregory A. Knox - Third Party Defendant

EXHIBIT # 1

the date of construction, as well as actions based on injuries occurring within the seven-year period if no action is filed within that period. Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1989).

Cited in Katsos v. Salt Lake City Corp., 634 F. Supp. 100 (D. Utah 1986); Lichtefeld v. Cutshaw, 784 P.2d 143 (Utah 1989); Stilling v. Skankey, 784 P.2d 144 (Utah 1989).

COLLATERAL REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d Building and Construction Contracts § 114.

A.L.R. — What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor, 1 A L R 3d 914.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

Key Numbers. — Limitation of Actions ⇐ 55(3).

78-12-26. Within three years.

Within three years:

(1) An action for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass.

(2) An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant.

(3) An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(4) An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

(5) An action to enforce liability imposed by Section 78-17-3, except that the cause of action does not accrue until the aggrieved party knows or reasonably should know of the harm suffered.

History: L. 1951, ch. 58, § 1; c. 1943, Supp., 104-12-26; L. 1986, ch. 143, § 1.

Cross-References. — "Action" includes special proceeding, § 78-12-46.

Livestock branding, Chapter 24 of Title 4.

Product Liability Act, statute of limitations, § 78-15-3.

Right of action for waste, § 78-38-2.

Three-year period for actions on insurance contracts, § 31A-21-313.

EXHIBIT #2

was an abuse of discretion. Griffiths v. Hammon, 560 P.2d 1375 (Utah 1977).

Cited in Utah Sand & Gravel Prods. Corp. v. Tolbert, 16 Utah 2d 407, 402 P.2d 703 (1965); J.P.W. Enters., Inc. v. Naef, 604 P.2d 486 (Utah 1979); Katz v. Pierce, 732 P.2d 92 (Utah 1986).

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: Graham v. Sawaya, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments §§ 1152 to 1213.

C.J.S. — 49 C J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇔ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the

action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

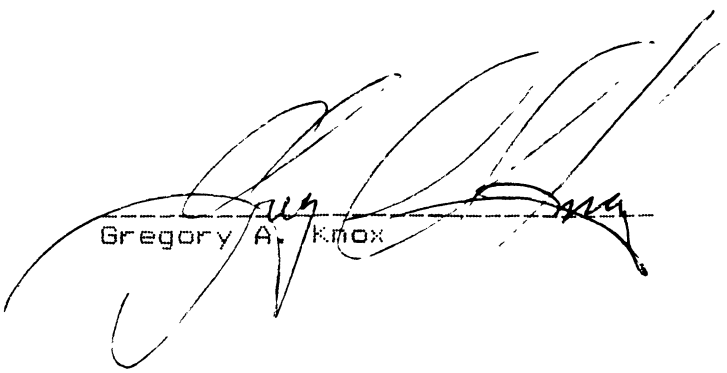
NOTES TO DECISIONS

ANALYSIS

MAILING CERTIFICATE

I do hereby certify that on this 6 day of APRIL, 1993, I did personally mail 2 true and correct copies of the above and foregoing document to:

Gary W. Pendleton
150 North 200 East, Suite 202
S. George, Utah 84770



Gregory A. Kmox